

**United States Department of the Interior
U.S. Fish and Wildlife Service
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AESO/FA

May 2, 2001

Ms. Cindy Lester
Chief, Regulatory Branch
U.S. Army Corps of Engineers
3636 North Central Avenue, Suite 760
Phoenix, Arizona 85012-1936

Dear Ms. Lester:

On January 9 and April 13, 2001, the Service submitted letters to the Corps requesting the opportunity to review and comment on documents prepared in support of Rio Verde Service's, Inc., application for a 404 permit for the Vista Verde project (2000-00599-AP) near Rio Verde in Maricopa County, Arizona. On April 17, 2001, we received copies of the biological evaluation (BE) and proposed mitigation plan. On that same date your office informed us, via electronic mail, that the Corps would wait until the Service provided comments on the BE and mitigation plan. These comments are provided under the authority of and in accordance with the Fish and Wildlife Coordination Act (48 Stat. 401, as amended U.S.C. 661 et. seq.).

As stated in our previous project letters, we believe the total impact of the development which would be authorized by your agency should be assessed, including indirect and cumulative effects and any interrelated and interdependent activities. We believe the footprint of the project to be permitted by your agency is, at a minimum, the total 856.2 acres of development. The mitigation plan has been prepared to only address impacts to 13.2 acres of jurisdictional waters. We find this approach inadequate to mitigate project related impacts. We believe the limited mitigation is the result of a scope of impact analysis narrowly and improperly confined to areas below the jurisdictional ordinary high water mark. The Section 404(b)(1) Guidelines For The Specification Of Disposal Sites For Dredged Or Fill Material (40 CFR Part 230) provides for your scope of analysis to include "surrounding areas", "secondary effects", and "other wildlife", all of which may occur below and/or above the ordinary high water mark.

As stated in the Public Notice (PN), the Corps has made a preliminary determination that an environmental impact statement is not required for the proposed work. We are concerned that this determination is also the result of a scope of impact analysis narrowly and improperly confined to areas below the ordinary high water mark. We believe this approach is inconsistent with the National Environmental Policy Act (NEPA). The Regulations For Implementing The Procedural Provisions Of The NEPA (40 CFR, Parts 1502.16 and 1508.8), prepared by the

Council on Environmental Quality, state the environmental consequences of an action include both direct effects and “Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”

We continue to be concerned with the potential for this proposed project to adversely affect the threatened bald eagle (*Haliaeetus leucocephalus*). Your PN stated that preliminary determinations indicate this proposed activity would not affect endangered or threatened species, or their critical habitat and therefore formal consultation under section 7 of the Endangered Species Act is not required. The BE states that bald eagles are not expected to nest or forage near the project area due to lack of permanent surface water. This analysis fails to account for Box Bar Ranch, less than a mile from the project site within the Tonto National Forest, where bald eagles have been known to nest for at least the past seven years. Our concern for potential effects to bald eagles is direct construction of the project and increased human presence that would result from urbanization. We are concerned this will increase disturbances at Box Bar that could negatively affect foraging, resting, loafing, and nesting activities of bald eagles and may eventually lead to nest site abandonment. The Arizona Game and Fish Department has also expressed concern to your office regarding the potential effects of urbanization in the Rio Verde area on bald eagles.

Per a November 18, 1999, memorandum, the Corps agreed to use the Fish and Wildlife Service/National Marine Fisheries Service consultation handbook and the section 7 regulations regarding interpretation of the scope of analysis for section 404 permitted activities. The section 7 regulations at 50 CFR 402.14(g)(3) requires the evaluation of the effects of the action and cumulative effects on listed species or critical habitat. “Effects of the action” include the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interdependent or interrelated with the action. “Interrelated actions” are those that are part of a larger action and depend on the larger action for their justification. “Interdependent actions” are those that have no independent utility apart from the action under consideration (50 CFR 402.02). The section 7 consultation handbook provides further guidance on the definition of interrelated and interdependent actions. The handbook establishes the following rule:

As a practical matter, the analysis of whether other activities are interrelated to, or interdependent with, the proposed action under consultation should be conducted by applying the “but for” test. The biologist should ask whether another activity in question would occur “but for” the proposed action. If the answer is no, that the activity in question would not occur but for the proposed action, then the activity is interrelated and interdependent and should be analyzed with the effects of the action.

The 404(b)(1) Guidelines (40 CFR Part 230.10) state that “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem.” Therefore, if we assume that projects to be permitted by the Corps are in compliance with 404(b)(1), then we necessarily assume that the Corps and applicant have analyzed alternatives that would result in no discharge of dredged or fill material for the purpose of constructing the overall project and have mutually determined that those alternatives are not economically, technically, or logistically capable of being done. Then, pursuant to section 7, project activities occurring above the ordinary high water mark are interdependent and/or interrelated to the Corps’ permit action because they cannot be constructed but for the issuance of a section 404 permit authorizing the proposed discharge and must be analyzed as effects of the action.

As such, we do not concur with your determination of no effect and continue to object to issuance of this permit. We suggest that you reevaluate the potential for the Vista Verde development to effect threatened and endangered species. We suggest that a cooperative effort with the Tonto National Forest could serve to more effectively address bald eagle concerns at Box Bar Ranch. Additionally, it may be prudent to determine the source of water supply for Vista Verde. In regards to compliance with the Endangered Species Act for the allocation of Central Arizona Project (CAP) water supply, the Bureau of Reclamation states in the Draft Environmental Impact Statement for Allocation Of Water Supply And Long-Term Contract Execution for the Central Arizona Project, June 2000; “For construction projects that are required in order for entities to take and use their CAP water, and for land disturbing activities on Indian lands that involve Federal funds or federally managed lands, follow-on compliance with this Act would be required once final plans are known and implementation is proposed.”

In addition to the Forest, if CAP water will be used we recommend the Corps also contact Reclamation to cooperatively address and remedy potential adverse effects to bald eagles from construction and use of the Vista Verde project. We are available to meet with you to discuss this matter. Please contact Mike Martinez (x224) or Don Metz (x217).

Sincerely,

/s/ David L. Harlow
Field Supervisor

cc: Regional Administrator, Environmental Protection Agency, San Francisco, CA
Forest Supervisor, Tonto National Forest, Phoenix, AZ
District Ranger, Cave Creek Ranger District, Cave Creek, AZ
Area Manager, Bureau of Reclamation, Phoenix, AZ
Supervisor, Project Evaluation Programs, Arizona Game and Fish Department, Phoenix, AZ

Ms. Cindy Lester

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